

2006

James Lewis Kimball v. Merae Kimball : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thomas R. Blonquist; Attorney for Respondent/Appellee/Cross-Appellant.

Wendy J. Lems; Lems Law Office, P.C.; Attorney for Petitioner/Appellant/Cross-Appellee.

Recommended Citation

Reply Brief, *Kimball v. Kimball*, No. 20060263 (Utah Court of Appeals, 2006).

https://digitalcommons.law.byu.edu/byu_ca2/6359

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,

Petitioner, Appellant, and
Cross-Appellee,

vs.

MERAE KIMBALL,

Respondent, Appellee, and
Cross-Appellant.

Appeal No. 20060263-CA

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

Consolidated Appeal from the Honorable Joseph C. Fratto of the Third Judicial District Court on September 20, 2005, rendered final by Ruling of February 21, 2006 in the parties' divorce matter; and consolidated with Fidelity appeal from Findings as entered April 27, 2007, April 30, 2007, August 21, 2007 and September 18, 2007.

Thomas R. Blonquist, #0369
40 South 600 East
Salt Lake City, Utah 84102
*Attorney for Respondent/Appellee/
Cross-Appellant*

Wendy J. Lems #7409
LEMS LAW OFFICE, P.C.
7050 S. Union Park Center, Ste. 350
Midvale, Utah 84047

*Attorney for Petitioner/Appellant/
Cross-Appellee*

**FILED
UTAH APPELLATE COURTS**

JUL -7 2008

TABLE OF AUTHORITIES

	<u>Page</u>
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1-3
POINT I: <u>APPELLANT WAS NOT REQUIRED TO MARSHAL THE EVIDENCE, AS ISSUES APPELLANT RAISED WERE NOT CHALLENGES TO FACTUAL FINDINGS</u>	3
POINT II: <u>SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT’S FINDING THAT THE FUNDS ACCESSED FROM THE FIDELITY ACCOUNT WERE USED FOR FAMILY PURPOSES</u>	4
POINT III: <u>SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT’S FACTUAL FINDINGS UNDERLYING ITS RULING HOLDING APPELLEE IN CONTEMPT OF COURT</u>	5
POINT IV: <u>THE TRIAL COURT APPROPRIATELY DENIED APPELLEE’S MOTION FOR RULE 11 SANCTIONS</u>	5
POINT V: <u>THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION</u>	6
POINT VI: <u>IN THE FIDELITY MATTER, THE TRIAL COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE APPELLANT TO SHOW HE WAS NOT UNJUSTLY ENRICHED</u>	7
POINT VII: <u>THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST ON APPELLEE’S UNJUST ENRICHMENT CLAIM</u>	8
POINT VIII: <u>THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY’S FEES AND COSTS</u>	9

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
REQUEST FOR ATTORNEY’S FEES AND COSTS	9
CONCLUSION	9
<u>STATUTES, RULES AND CONSTITUTIONAL PROVISIONS</u> ¹	
Utah Code Annotated 78B-6-301 (recodified 2/07/08, previously §78-32-1)	5
Utah Rule of Appellate Procedure 24(a)(9)	1
Utah Rule of Appellate Procedure 33	9
Utah Rule of Appellate Procedure 34	9

¹ Appellee’s statement of statutes requires updating. Appellee’s Utah Code Annotated 78-2a-3 is now recodified as §78A-4-103; and 78-27-56 is now recodified as §78B-5-825

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
 <u>CASES</u>	
A.K. & R. Whipple Plumbing & Heating v. Aspen Constr., 977 P.2d 518, 522 (Utah Ct. App. 1999)	8
Andersen v. Andersen, 757 P.2d 476, 480 (Utah App. 1988)	9
Bailey-Allen Co., Inc. v. Kutzet, 876 P.2d 1111 (Utah App. 1994)	8
Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1994)	8
Burke v. Burke, 733 P.2d 133 (Utah 1987)	6
Dejavue Inc. v. Utah Energy Corp., 1999 UT App 355 ¶¶ 24-25	8
Desert Miriah, Inc. v. B&L Auto Inc., ¶ 13, 2000 UT 83	8
Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980)	3
Griffith v. Griffith, 1999 UT 78, ¶¶ 12-13, 985 P.2d 255 (Utah 1999)	5
Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993)	3
Haumont v. Haumont, 793 P.2d 421, 425 (Utah App. 1990)	9
Mortensen v. Mortensen, 760 P.2d 501 (Utah 1988)	3
Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987)	3
Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998)	8
Peterson v. Peterson, 818 P.2d 1305, 1310 (Utah App. 1991)	9
Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App. 1988)	9
Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994)	6
Shoreline Development Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. 1992)	9
Thomas v. Thomas, 569 P.2d 1119 (Utah 1997)	5

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
<u>SECONDARY SOURCES</u>	
Blacks Law Dictionary (7 th ed. Abridged)	6
Judge Norman H. Jackson, <i>Utah Standards of Appellate Review – Revised</i> , 12 Utah Bar J. 8 (1999)	4
Ryan D. Tenny, <i>the Utah Marshaling Requirement An Overview</i> , 17 Utah Bar J. 22 (2004)	4

IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,

Petitioner, Appellant, and
Cross-Appellee,

vs.

MERAE KIMBALL,

Respondent, Appellee, and
Cross-Appellant.

Appeal No. 20060263-CA

SUMMARY OF ARGUMENTS

POINT I: APPELLANT WAS NOT REQUIRED TO MARSHAL THE EVIDENCE, AS ISSUES APPELLANT RAISED WERE NOT CHALLENGES TO FACTUAL FINDINGS.

This Court should find that because the issues raised by James Kimball (Appellant/Cross-Appellee) were not challenges to factual findings or challenges to the sufficiency of the evidence, the marshaling requirements of Utah Rule of Appellate Procedure 24(a)(9) does not apply, thus in Appellant's brief, he was not required to marshal the evidence regarding his claims.

POINT II: SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT'S FINDING THAT THE FUNDS ACCESSED FROM THE FIDELITY ACCOUNT WERE USED FOR FAMILY PURPOSES.

This Court should find that there is sufficient evidence in the record, testimonial evidence corroborated by physical evidence, to support the trial court's findings that "it is reasonable" that funds James Kimball (Appellant/Cross-Appellee) accessed from the Fidelity account were used for family purposes.

POINT III: SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS UNDERLYING ITS RULING HOLDING APPELLEE IN CONTEMPT OF COURT.

This Court should find that there was sufficient evidence presented at trial to support the trial court's factual findings underlying its findings of contempt on behalf of Merae Kimball (Appellee/Cross-Appellant), thus finding it was not clearly erroneous.

POINT IV: THE TRIAL COURT APPROPRIATELY DENIED APPELLEE'S MOTION FOR RULE 11 SANCTIONS.

This Court should find that as there was no evidence that counsel for James Kimball (Appellant/Cross-Appellee) intended to mislead or misrepresent, thus the trial court appropriately denied Merae Kimball's Motion for Rule 11 Sanctions.

POINT V: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION

This Court should find it was an abuse of the trial court's discretion to fail to find that the Stock Purchase Agreement Monies were part of the parties' marital assets, by their character as a marital asset (non-inherited or co-mingled and enhanced).

POINT VI: IN THE FIDELITY MATTER, THE TRIAL COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE APPELLANT TO SHOW HE WAS NOT UNJUSTLY ENRICHED.

This Court should find that the trial court erred by improperly imposing a burden of proof on James Kimball (Appellant/Cross-Appellee) to show how certain funds in question were used, rather than upon Merae Kimball (Appellee/Cross-Appellant), to prove all elements of her unjust enrichment cause of action.

POINT VII: THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST ON APPELLEE'S UNJUST ENRICHMENT CLAIM.

The trial court erred in awarding prejudgment interest on Merae Kimball's (Appellee/Cross-Appellant) unjust enrichment claims. Appellee had not requested such in her Amended Complaint, nor had Appellee presented any arguments regarding such at time of trial in the Fidelity action.

POINT VIII: THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY'S FEES AND COSTS

This Court should find that it was an abuse of the trial court's discretion to deny Appellant, James Kimball's request for attorney's fees and costs.

ARGUMENT

POINT I: APPELLANT WAS NOT REQUIRED TO MARSHAL THE EVIDENCE, AS ISSUES APPELLANT RAISED WERE NOT CHALLENGES TO FACTUAL FINDINGS

The first issue on appeal that James Kimball (Appellant/Cross-Appellee) raised was whether the trial court abused its discretion in finding that the Stock Purchase Agreement monies were not marital property subject to equitable distribution. The second issue, was whether it was an abuse of discretion of the trial court to deny James' 60(b) Motion where the drafted documents did not reflect orders of the Court. Lastly on appeal of the Divorce matter, James states that the trial court abused its discretion by not awarding him attorney's fees and costs. (See Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980); Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993); Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988); and Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987)).

Neither the rationales in support of, nor the rule requiring marshaling the evidence apply to review of questions of law, questions of application of law to fact, or questions

within the trial court's discretion. As none of these three issues raised by James were factual questions or challenges to the sufficiency of the evidence, therefore, the marshaling requirement is not applicable to the briefing of those issues. (See, Judge Norman H. Jackson, *Utah Standards of Appellate Review – Revised*, 12 Utah Bar J. 8 (1999); and Ryan D. Tenny, *the Utah Marshaling Requirement: An Overview*, 17 Utah Bar J. 22 (2004)).

POINT II: SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT'S FINDING THAT THE FUNDS ACCESSED FROM THE FIDELITY ACCOUNT WERE USED FOR FAMILY PURPOSES

Appellant, James Kimball always had an active interest in his family, evidenced by playing a key role in negotiations over the purchase price of the Stock Purchase Agreement monies; managing the investment of the sales proceeds; and solely managing the parties' finances, including management of the Stock Purchase Agreement monies. Additionally, James played a significant role in the purchasing of personal property for the family such as a boat and a suburban vehicle, as well as real property, taking title as joint tenants in common.

In James' testimony during the Divorce trial, he stated it was a common practice of the parties to transfer funds from the Fidelity account to the joint Bank One account so that funds could be used in a piecemeal fashion for family expenses. (Div. Trans. 924:10; 957:17). Such family expenses included payment of household bills and utilities, and maintenance of the family including recreation, groceries, tennis lessons, club memberships, gasoline, automobile payments, insurance payments, family trips, boating trips, holiday shopping, payment of loans, and payment of unexpected expenses related to

family boat and automobile accidents. As a devoted family man, trying to meet the demands required to provide for a family, it is clear monies withdrawn from the Fidelity account were for the purpose of benefiting his family. At no time has the Appellee, Merae offered any evidence to suggest James used these monies for any other purposes.

POINT III: SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS UNDERLYING ITS RULING HOLDING APPELLEE IN CONTEMPT OF COURT

It is well established in Utah law that courts have an inherent power to punish for contempt and waste of judicial resources. (See Griffith v. Griffith, 1999 UT 78, ¶¶ 12-13, 985 P.2d 255 (Utah 1999) (internal citation omitted)). Contempt is a collateral matter that the courts have continuing jurisdiction over, pursuant to Utah Code Annotated 78B-6-301 et seq., (recodified 2/07/08, previously §78-32-1), and is not required to be reserved by the parties. There is sufficient evidence on the record to support the trial court's finding of contempt against Merae Kimball (Appellee/Cross-Appellant). Merae had violated a multitude of court orders and, at the time of the Divorce trial, James was able to demonstrate the following: 1) That Merae knew what was required, 2) that Merae had the ability to comply, and 3) that Merae had intentionally failed or refused to do so. (See Thomas v. Thomas, 569 P.2d 1119 (Utah 1997)). Merae did not dispute this evidence or offer any rebuttal testimony. Therefore, the evidence is sufficient to demonstrate that the trial court's findings is not against the clear weight of the evidence and should not be found by this court to be "clearly erroneous."

POINT IV: THE TRIAL COURT APPROPRIATELY DENIED APPELLEE'S MOTION FOR RULE 11 SANCTIONS

This Court should sustain the trial court's denial of Merae's Motion for Rule 11 Sanctions. Merae's Request to impose Rule 11 Sanctions against James' counsel was based on an inadvertent mistake which James had made on a credit application at a car dealership. Namely, James inadvertently stated on the credit application that he made "\$60,000.00 per month," instead of stating that he made \$60,000.00 per year. There was no evidence presented at the time of the Rule 11 Motion, nor has there been any evidence presented that counsel for James intended to misrepresent or mislead with the representations made by James. Additionally, public policy would demand that there be some margin for human error allowed without punitive repercussions. Therefore, the trial court appropriately denied the Rule 11 Motion for Sanctions, and Appellant urges this Court to sustain such Ruling.

POINT V: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION

"Inheritance" is defined as "property received from an ancestor under the laws of intestacy" and "property that a person received by bequest or devise." (See Blacks Law Dictionary, 628 (7th ed. Abridged)). Consistent with this definition, property has been considered "inheritance" by Utah courts in the division of marital assets where it was received by intestate succession or through the probate of a will, never as broadly as to include intervivos transfers. (See *Burke v. Burke*, 733 P.2d 133 (Utah 1987); and *Schaumberg v. Schaumberg*, 875 P.2d 598 (Utah App. 1994)). After absorbing the true meaning of these definitions, it would be difficult to see how the Stock Purchase Agreement monies received could be characterized as "inheritance." Such funds resulted

from the sale of stock which Appellee received from her mother following her father's death. Appellee's mother is the only person who "inherited" anything from Appellee's father, pursuant to the agreed upon alteration of her father's will. (Div. Trans. 77:22-25; 78:1-25; 79:12-25; 80:1-19; Addendum 18).

Alternatively, if this Court finds that the Stock Purchase Agreement monies did indeed result from inheritance, then Appellant, James Kimball asks this Court to find that the funds nevertheless lost their separate character as such by being co-mingled with the marital estate. This is clearly evidenced by the parties' practice of transferring funds from the Fidelity account to the joint Bank One account so that the funds could be used for family expenses as further identified herein. Additionally, the parties historically filed joint tax returns with the tax debt owing, as a result of the Stock Purchase Agreement monies, being paid from bank account the parties maintained jointly; and further, the parties had withdrawn monies from the Fidelity account to purchase their 2248 East Lauri Kay Drive, Salt Lake City, Utah, Parcel #1 property as joint tenants. Filing joint tax returns, purchasing vehicles, purchasing real estate, as well as funding family recreation, holidays and vacations is all consistent with any married couple who treats all marital money as an asset to the marriage.

POINT VI: IN THE FIDELITY MATTER, THE TRIAL COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE APPELLANT TO SHOW HE WAS NOT UNJUSTLY ENRICHED

This Court should find that the trial court erred by improperly imposing a burden of proof on James Kimball to show how certain funds in questions were used, rather than on Merae to prove all elements of her own unjust enrichment cause of action. Which

party has the burden of proof is a legal question reviewed for correctness using a “correction of error” standard of review. (See Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); and A.K. & R. Whipple Plumbing & Heating v. Aspen Constr., 977 P.2d 518, 522 (Utah Ct. App. 1999)). Under Utah law, Merae had the burden to prove three (3) separate elements to sustain a claim of unjust enrichment as follows: 1) a benefit conferred on one person by another, 2) appreciation or knowledge of the benefit by the conferee, and 3) acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. (See Desert Miriah, Inc. v. B&L Auto Inc., 2000 UT 83, ¶ 13 (citing Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1994))).

Under Utah law, James asks this court to recognize that Merae had the burden to prove the elements to sustain her own claim of unjust enrichment.

POINT VII: THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST ON APPELLEE’S UNJUST ENRICHMENT CLAIM

The trial court erred in awarding pre-judgment interest on Appellee, Merae Kimball’s cause of action for unjust enrichment, in that Merae had not requested such in her Amended Complaint, nor had she presented any arguments at the time of the Fidelity trial regarding the same. James is entitled to notice of claims to be presented in order to defend against the same. James was not provided such notice nor reasonable opportunity to respond to Merae’s closing arguments requesting an award of pre-judgment interest on the alleged “forged” or “fraudulent” checks. (Dejavue Inc. v. U.S. Energy Corp., 1999 UT App. 355 ¶¶ 24-25; Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421 (Utah App. 1994);

Shoreline Development Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. 1992)).

POINT VIII: THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY'S FEES AND COSTS

This Court should find that it was an abuse of the trial court's discretion to deny Appellant, James Kimball's request for attorney's fees and costs, especially where James had demonstrated respective financial need; reasonableness of fees should have only determined the amount of the award not resulting in a denial in entirety; and the trial court should not have relied upon whether the payment of fees had been advanced by a third party. Peterson v. Peterson, 818 P.2d 1305, 1310 (Utah App. 1991); Haumont v. Haumont, 793 P.2d 421, 425 (Utah App. 1990); Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App. 1988); and Andersen v. Andersen, 757 P.2d 476, 480 (Utah App. 1988).

REQUEST FOR ATTORNEY'S FEES AND COSTS

Pursuant to Rules 33 and 34 of the Utah Rules of Appellate Procedure, the Appellant/Cross-Appellee, James Kimball respectfully requests attorney's fees and costs for filing this Reply on appeal.

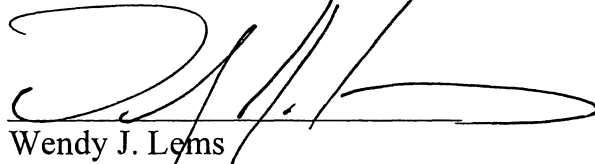
CONCLUSION

Appellant/Cross-Appellee, James Kimball respectfully requests that this Court: 1) Find that James was not required to marshal the evidence, as the issues he presented for appeal did not challenge Findings of Fact; 2) sustain the trial court's findings that the Stock Purchase Agreement monies from the Fidelity account were used for family purposes; 3) sustain the trial court's finding regarding the contempt of Appellee/Cross-Appellant, Merae Kimball; 4) sustain the trial court's ruling that Rule 11 sanctions are

not appropriate in this matter; 5) find the trial court erred in characterizing the Stock Purchase Agreement monies as inheritance, and find that such monies are indeed part of the marital assets subject to equitable distribution; 6) find that the trial court erred in the Fidelity matter by placing the burden of proof on the Appellant, James Kimball, and recognize that the burden of proof should be on Appellee, Merae Kimball to prove all the elements of her unjust enrichment cause of action; 7) find that the trial court erred in its award of pre-judgment interest; and 8) overturn the denial of Appellant, James Kimball's attorney's fees and costs at time of trial.

RESPECTFULLY SUBMITTED this 7th day of July, 2008.

LEMS LAW OFFICE, P.C.



Wendy J. Lems
*Attorney for Petitioner/Appellant/Cross-Appellee,
James Kimball*

CERTIFICATE OF SERVICE

I certify that on this 7th day of July, 2008, a true and correct copy of the forgoing was sent via Hand-Delivery, to the following:

Thomas R. Blonquist, Esq.
40 South 600 East
Salt Lake City, Utah 84102
*Attorney for Respondent/Appellee/Cross-Appellant,
Merae Kimball*

